

**A      The Government of Malaysia v Imej Warisan Sdn Bhd**

**B** COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO  
S-01(W)-365-11 OF 2015  
TENGGU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI  
JJCA  
8 DECEMBER 2017

**C** *Contract — Interpretation — Objective intention of contracting parties*  
— *Building contract provided that employer could defer payment on any interim*  
*certificate up to specified date — Contractor agreed that if employer deferred*  
*payment as stipulated it would not claim for any loss, expense, interest etc in respect*  
**D** *of such interim certificate — Contractor later sued employer for late payment*  
*interest on certain interim certificates — Trial court allowed claim holding it was*  
*reasonable to imply that after date specified in clause on deferment late payment*  
*interest was claimable — Whether trial court was wrong to imply term not in*  
*contract — Whether clause was clear and unambiguous and effect should have*  
*been given to it as it stood*

**E** The appellant appointed the respondent to carry out a ‘design and build’  
project which was due for completion by the end of February 2007. Due to  
various delays, the appellant granted the respondent four extensions of time  
‘(EOT)’, the last of which expired on 21 October 2008. Pursuant to cl 41.2 of  
**F** the contract, the project director (‘PD’) issued the certificate of practical  
completion of the project on 16 February 2009. This was deemed under the  
contract to be the date of completion. The local district council issued its  
certificate of occupation for the project on 12 February 2009. The appellant  
imposed liquidated and ascertained damages (‘LAD’) amounting to  
**G** RM685,225.71 (at the rate of RM25,378.73 per day) against the respondent  
for 27 days’ delay in completion of the project. This was computed by  
deducting from the 117 days’ delay (ie, from the expiry of the fourth extension  
of time on 21 October 2008–16 February 2009) 90 days’ of exemption given  
to the respondent under cl 14 of the Government’s Circular No 8 of 1995.  
**H** Under cl 50.4 of the contract, the appellant reserved the right to defer payment  
on any interim certificate issued by the PD for a period up to, but not later  
than, 31 March 2006 and if the appellant exercised that right, the respondent  
agreed that it would not claim payment of the sum stated in the interim  
certificate ‘or for any loss, expense, interest, financing charges or whatsoever in  
**I** connection therewith’. Despite that clause, the respondent sued the appellant  
for late payment interest of RM1,511,386.84 with respect to interim  
certificates Nos 2–39 which were allegedly paid after the agreed timeline of 30  
days as stipulated under cl 50.3 of the contract. The respondent also contended  
that it was not guilty of causing any delays and therefore it was wrong of the

appellant to impose the LAD. The respondent also claimed RM3.4m in damages for financial charges and loss and expense it had suffered. After a full trial, the High Court: (a) ordered the appellant to pay the respondent late payment interest of RM1,021,932.18; (b) held that the appellant was entitled to impose LAD but only for 24 days amounting to RM609,089.52; and (c) dismissed the RM3.4m damages claim on the ground it had not been proven. The appellant appealed to the Court of Appeal against the whole of the decision while the respondent cross-appealed against that part of the decision concerning the late payment interest and the LAD.

**Held**, allowing the appellant's appeal, dismissing the respondent's cross-appeal, setting aside the trial court's decision to allow the claim for late payment interest, affirming its decision to allow the LAD but substituting in place of RM609,089.52 the sum of RM685,225.17:

- (1) Clause 50.4 of the contract was clear and free of ambiguity. It was not a situation where the trial court was called upon to make a choice between two meanings. The trial judge ought to have disregarded the evidence of PW1 which was declaratory of subject intent. On the totality of the evidence, there was no justification for the importation of an implied term to give effect to the bargain of the parties or to add to business efficacy (see para 30).
- (2) The computation of the 30 day time period for payment of the interim certificates was calculated from the date the certificates were issued by the PD. The evidence showed that the interim certificates in question were paid within the 30 day timeline. Accordingly, the question of interest chargeable on late payment was a non-issue (see para 31).
- (3) With regard to the LAD, the trial judge erred in finding that the date of completion was the date of the occupation certificate. The delay in issuance of the occupation certificate by the district council was not a material factor because: (a) the contract defined the completion date as the date of the certificate of practical completion by the PD under cl 41.2; and (b) as it was a 'design and build' contract, it was the respondent's obligation to obtain the occupation certificate. Accordingly, the LAD due to the appellant should have been calculated on the basis of 27 days as computed by the appellant (see para 32).
- (4) The respondent's cross-appeal was dismissed in view of this court's decision with respect to the LAD and the ruling that the respondent was not entitled to claim for late payment interest under the contract (see para 33).

**[Bahasa Malaysia summary]**

Perayu telah melantik responden untuk menjalankan projek 'design and build' yang dijangka siap pada akhir Februari 2007. Akibat pelbagai kelewatan,

- A perayu telah memberikan responden empat lanjutan masa (LM'), yang mana lanjutan terakhir telah luput pada 21 Oktober 2008. Menurut fasal 41.2 kontrak, pengarah projek ('PP') telah mengeluarkan sijil siap untuk projek tersebut pada 16 Februari 2009. Ini dianggap di bawah kontrak sebagai tarikh siap. Majlis daerah tempatan telah mengeluarkan sijil pendudukannya untuk projek tersebut pada 12 Februari 2009. Perayu telah mengenakan ganti rugi jumlah tertentu dan ditentukan ('GRJTDD') berjumlah RM685,225.71 (pada kadar RM25,378.73 setiap hari) terhadap responden kerana kelewatan 27 hari untuk siap projek tersebut. Ini telah dikira dengan menolak daripada kelewatan 117 hari (iaitu, dari tempoh luput lanjutan masa keempat pada 21 Oktober 2008–16 Februari 2009) pengecualian 90 hari telah diberikan kepada responden di bawah fasal 14 Pekeliling Kerajaan No 8 Tahun 1995. Di bawah fasal 50.4 kontrak tersebut, perayu telah merizabkan hak untuk menangguhkan pembayaran apa-apa sijil interim yang dikeluarkan oleh PP untuk tempoh sehingga, tetapi tidak lebih daripada, 31 Mac 2006 dan jika perayu menggunakan hak tersebut, responden bersetuju bahawa ia tidak akan menuntut bayaran jumlah yang dinyatakan dalam sijil interim itu 'or for any loss, expense, interest, financing charges or whatsoever in connection therewith'. Walaupun terdapat fasal itu, responden telah menyaman perayu untuk faedah bayaran lewat sejumlah RM1,511,386.84 berkaitan sijil-sijil interim No 2–39 yang dikatakan telah dibayar selepas garis masa yang dipersetujui sejumlah 30 hari sepertimana dinyatakan di bawah fasal 503 kontrak itu. Responden juga berhujah bahawa ia tidak bersalah kerana menyebabkan apa-apa kelewatan dan oleh itu tidak salah untuk perayu mengenakan GRJTDD. Responden juga menuntut RM3.4 juta untuk ganti rugi caj kewangan dan kerugian dan perbelanjaan yang dialaminya. Setelah perbicaraan penuh, Mahkamah Tinggi: (a) memerintahkan perayu membayar responden faedah bayaran lewat berjumlah RM1,021,932.18; (b) memutuskan bahawa perayu berhak untuk mengenakan GRJTDD tetapi hanya untuk 24 hari berjumlah RM609,089.52; dan (c) menolak tuntutan ganti rugi RM3.4 juta atas alasan ia tidak dibuktikan. Perayu merayu kepada Mahkamah Rayuan terhadap keseluruhan keputusan manakala responden merayu balas terhadap sebahagian daripada keputusan itu berkenaan faedah bayaran lewat dan GRJTDD.
- H **Diputuskan**, membenarkan rayuan perayu, menolak rayuan balas responden, mengetepikan keputusan mahkamah perbicaraan untuk membenarkan tuntutan untuk faedah bayaran lewat, mengesahkan keputusannya untuk membenarkan GRJTDD tetapi menggantikan jumlah RM609,089.52 dengan jumlah RM685,225.17:
- I (1) Fasal 50.4 kontrak adalah jelas dan bebas daripada ketaksaan. Ia bukan situasi di mana mahkamah perbicaraan dipanggil untuk membuat pilihan antara dua maksud. Mahkamah perbicaraan sepatutnya tidak menghiraukan keterangan PW1 yang merupakan pengisytiharan niat

subjek. Berdasarkan keseluruhan keterangan, tiada justifikasi untuk penggunaan terma tersirat untuk memberikan kesan kepada tawar-menawar daripada pihak-pihak atau untuk meningkatkan keberkesanan perniagaan (lihat perenggan 30).

- (2) Pengiraan tempoh 30 hari untuk bayaran sijil-sijil interim telah dikira dari tarikh sijil-sijil itu dikeluarkan oleh PP. Keterangan menunjukkan bahawa sijil-sijil interim yang dipersoalkan telah dibayar dalam garis masa 30 hari. Sewajarnya, persoalan tentang faedah yang boleh dikenakan ke atas bayaran lewat bukan isu (lihat perenggan 31).
- (3) Berdasarkan GRJTDD, hakim perbicaraan terkhilaf dalam dapatan bahawa tarikh siap adalah tarikh sijil pendudukan. Kelewatan dalam pengeluaran sijil pendudukan oleh majlis daerah bukan faktor penting kerana: (a) kontrak itu mentafsirkan tarikh siap sebagai tarikh sijil siap praktikal oleh PP di bawah fasal 41.2; dan (b) oleh kerana ia adalah kontrak 'design and build', ia adalah obligasi responden untuk memperoleh sijil pendudukan. Sewajarnya, GRJTDD yang kena dibayar kepada perayu patut dikira berasaskan 27 hari seperti yang dikira oleh perayu (lihat perenggan 32).
- (4) Rayuan balas responden telah ditolak berdasar keputusan mahkamah ini berhubung GRJTDD dan keputusan bahawa responden tidak berhak kepada tuntutan untuk faedah bayaran lewat di bawah kontrak itu (lihat perenggan 33).]

#### Notes

For cases on objective intention of contracting parties, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5901–5903.

#### Cases referred to

- Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 2 All ER 1127; [2009] UKPC 10, PC (refd)
- Bank of Credit and Commerce International SA v Ali and others* [2001] 2 WLR 735, HL (refd)
- Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)
- Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98, HL (refd)
- Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; [1987] 1 LNS 37, PC (refd)
- Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, HL (refd)

- A *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd*  
[2017] 2 MLJ 819, CA (refd)  
*SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464,  
FC (refd)
- B *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor*  
[2008] 5 MLJ 157, CA (refd)

**Appeal from:** Writ of Summons BKI-21–13/6 of 2013 (High Court, Kota Kinabalu)

- C *Ahmad Terrirudin bin Mohd Salleh (Azlina bt Mahmud with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.*  
*Henri PS Cheu (Sean Lian with him) (Cheu, Adnan & Razi) for the respondent.*

**Vernon Ong JCA:**

D INTRODUCTION

- E [1] Pursuant to a design and build contract entered into between Imej Warisan Sdn Bhd (the plaintiff in the court below) and the Government of Malaysia (the defendant in the court below), the plaintiff sued the defendant for: (i) late payment interest of RM1,511,386.84; (ii) damages in the sum of RM685,225.71 for wrongful deduction of liquidated ascertained damages ('LAD') of 27 days; and (iii) damages of RM3,420,320.96 for loss and expense suffered by the plaintiff in respect of the delay in the completion of the project.

- F [2] After a full trial at the Kota Kinabalu High Court, the learned judge allowed the plaintiff's claim and made the following orders, inter alia:

- G (a) the defendant to pay the plaintiff late payment interest of RM1,021,932.18 together with interest at 4%pa from date of judgment until realisation;
- H (b) the defendant is entitled to impose LAD of 24 days only amounting to RM609,089.52 and not RM685,225.71 and the defendant to refund to the plaintiff the difference of RM76,136.19; and
- (c) the plaintiff's claim for RM3,420,320.96 for loss and expense is dismissed.

- I [3] Dissatisfied, the defendant appealed against the whole of the decision whilst the plaintiff cross-appealed against part of the decision relating to the late payment interest and deduction of the LAD.

[4] On 17 January 2017 after hearing of submission of counsel for the parties we arrived at a unanimous decision to allow the defendant's appeal and

dismiss the plaintiff's cross-appeal. We now set out our reasons below. In this judgment, the parties shall be referred to as they were in the court below.

#### BRIEF ACCOUNT OF THE SALIENT FACTS

[5] Pursuant to a contract dated 18 November 2005, the defendant appointed the plaintiff to design and build the project known as 'Cadangan Merekabentuk, Membina dan Menyiapkan Sekolah Menengah Teknik Beaufort, Sabah dan 150 unit Kuarters Institusi Pendidikan' for the contract price of RM96,865,377.

[6] The contract was for a period of 30 months calculated from 26 August 2004 and due for completion on 25 February 2007. Oscabumi Sdn Bhd was appointed as the project management consultant for the project ('the PMC').

[7] A total of four certificates of delay and extensions of time ('EOT') for the completion of the project were granted to the plaintiff. The particulars are as follows:

|      |                                          |
|------|------------------------------------------|
| EOT1 | 180 days — 25 February–24 August 2007    |
| EOT2 | 125 days — 24 August–27 December 2007    |
| EOT3 | 270 days — 27 December 2007–23 June 2008 |
| EOT4 | 120 days — 23 June–21 October 2008       |

[8] The occupation certificate was issued by the Beaufort District Council on 12 February 2009. According to the certificate of practical completion, the project was completed on 16 February 2009.

#### THE PLAINTIFF'S CLAIM

[9] The plaintiff's claim for late payment interest relates to interim certificates No 2–39 which were paid after the timeline of 30 days for due payment pursuant to cl 50.3 of the contract.

[10] The plaintiff's claim for damages for wrongful deduction of LAD of 27 days is predicated on the fact that there are no grounds for imposing LAD. The delay was caused by the Beaufort District Council in the issuance of the occupation certificate.

[11] The plaintiff's claim for damages in the sum of RM3,420,320.96 due to late payment of the interim certificates is in respect of financial charges (RM1,363,419.26) and loss and expense incurred (RM2,083,901.70) due to the delay of 12 months.

**A FINDINGS OF THE HIGH COURT**

[12] The findings of the learned judge on the three principal issues may be summarised as follows:

- B** (a) Whether the plaintiff is entitled to late payment interest under cl 50.4 of the contract?
- C** (i) three of the four EOT showed that the delays were due to circumstances beyond the control of the plaintiff. The defendant had agreed with the reasons by giving EOT1, 2 and 4. EOT3 was due to late approval and instruction from KPM. Up to 21 October 2008, the delays were not due to the fault of the plaintiff which would subject the plaintiff to penalties;
- D** (ii) the defendant's contention that the late issuance of payment certificates was caused by the plaintiff's delay or failure to complete the works in accordance with the schedule could not be sustained. There was no evidence that the late issuance of payment certificates was caused by the plaintiff's delay or failure to complete the works in accordance with the schedule;
- E** (iii) the defendant's right to defer payment under cl 50.4 was subject to the cut-off date of 31 March 2006. The defendant could not defer payment on any interim certificate issued after 31 March 2006; and
- F** (iv) reading cl 50.4, the plaintiff is entitled to claim for loss, expense, interest or financing charges for late payment on interim certificates;
- (b) whether the defendant is entitled to impose LAD amounting to RM685,225.17 against the plaintiff?
- G** (i) the date of completion should be based on the occupation certificate and not on the certificate of practical completion; and
- (ii) there was a delay of completion of 24 days and not 27 days as contended by the defendant. As such, the LAD amounted to RM609,089.52 and not RM685,225.71;
- H** (c) whether the plaintiff is entitled to damages of RM3,420,320.96 arising from the late payment of the contract sum?
- I** (i) the claim for financial charges of RM1,363,419.26 is not proven as the plaintiff did not plead and did not lead any evidence on its financial position; and
- (ii) the claim for loss and expense incurred of RM2,083,901.70 is not proved as the plaintiff did not produce any documentary evidence to substantiate its claim.

## SUBMISSION OF PARTIES

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[13] At the hearing of the appeal, learned senior federal counsel ('SFC') advanced two main grounds. The first relates to late payment interest and the second to LAD. On the first ground, learned SFC argued that notwithstanding cl 50.3, the time for payment of interim certificates was deferred under cl 50.4 which reads as follows:

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Notwithstanding clauses 50.1 to 50.3 above, the Government reserves the right to defer payment to the Contractor on any Interim Certificate which has been or to be issued by the PD for a period of up to but no later than 31 March 2006. In the event that the Government exercises this right, the Contractor shall waive all rights to claim against the Government for any payment in respect of such Interim Certificate and any loss, expense, interest, financing charges of whatsoever in connection therewith.

C

[14] Learned SFC argued that cl 50.4 is silent on late payment interest after 31 March 2006 and that as such there is nothing to support the plaintiff's contention that it was the intention of the parties to provide for late payment interest. Reference was made to DW1's evidence that cl 50.4 was inserted because the plaintiff was prepared to execute the project without having receiving payment and to wait until the 9th Malaysia Plan.

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[15] As such, it was argued that in construing cl 50.4 to give the plaintiff the right to claim late payment interest, the learned judge had erred as he had impliedly imported a new term even though the contract is clear and unambiguous. In support of his argument, learned SFC cited *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157 (CA) and *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819 (CA).

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[16] Further, learned SFC argued that the learned judge failed to determine the date of honouring interim certificate pursuant to cl 50.3(c) shall take effect from the date the project director ('PD') signed on the interim certificate until the payment date and not from the date the PMC issued the payment claim to the defendant. The role of the PMC is only to recommend payment; the PMC is not authorised to certify payment. The schedule entitled 'Recalculation of the Schedule of the Interim Certificate Payment' shows that payments on the interim certificates were made within 30 days. Further, the evidence of DW2 shows that all payments on interim certificates were made within 30 days as provided under cl 50.3.

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[17] Secondly, learned SFC argued that under cl 41.2 of the contract, completion occurs when the whole of the works have reached practical

A completion to the satisfaction of the PD. As such, the learned judge erred in holding that the completion should be based on the occupation certificate and not on the certificate of completion.

B [18] In this case, learned SFC submitted that LAD was only imposed for the delay in completing the works after EOT4 expired from 21 October–16 February 2009 (117 days). However, pursuant to cl 14 of the Government's Circular Bil 8 of 1995, the plaintiff was eligible to be given 90 days exemption from LAD (22 October 2008–19 January 2009). Thus, the plaintiff was only imposed LAD for 27 days (117 – 90 days) for the period from 21 January 2009–16 February 2009 amounting to RM685,225.71 calculated at RM25,378.73 per day. The learned judge erred in calculating the number of days up to the date of the issuance of the occupation certificate which is inconsistent with cl 41.2 of the contract which provides the date of the certificate of practical completion.

E [19] In his short reply, learned counsel for the plaintiff argued that the learned judge was correct in construing cl 50.4 together with cl 50.3. The plaintiff had the implied right to claim for loss, expense, interest or financing charges for late payment on any interim certificate issued after 31 March 2006. There was no evidence to show that the late issuance of payment certificates was caused by the plaintiff's delay or failure in completing the works in accordance with the schedules.

F [20] Learned counsel also argued that the defendant cannot rely on cl 50.2(c) and 50.3(c) of the contract because the signing of the interim certificates was purposely delayed by the PD due to lack of funds and that the defendant's 'Recalculation of the Schedule of the Interim Certificate Payment' could not be relied on because some of the interim certificates did not have the signing date by the PD and some were missing altogether.

H [21] Learned counsel also argued that the learned judge was correct to find that the completion date should be the date of the occupation certificate which signifies that the project was completed and ready for occupation. The defendant should not be allowed to rely on cl 41.2 of the contract.

I [22] On the plaintiff's cross-appeal, learned counsel argued that whilst the learned judge was correct in finding that the plaintiff was entitled to late payment interest, the learned judge erred in adopting the defendant's 'Recalculation of the Schedule of the Interim Certificate Payment' and adding on interim certificates Nos 4 and 5 instead of adopting the plaintiff's 'Recalculation Schedule'. The correct amount should be RM1,094,742.93.

[23] Lastly, learned counsel argued that the learned judge ought not to have allowed the defendant to deduct any LAD because the delay in obtaining the occupation certificate from the Beaufort District Council was beyond the control of the plaintiff.

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#### DECISION

B

[24] We will deal with the first issue relating to late payment interest which turns on the interpretation of cl 50.4 of the contract. It has oft been said that where the court is called upon to interpret a contract, it will do so in a sensible fashion (see *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; [1987] 1 LNS 37). In this connection, it is also instructive to consider Lord Steyn's statement in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:

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In determining the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial transaction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic.

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[25] Thus, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract. Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines: *Berjaya Times Squares Sdn Bhd* (formerly known as *Berjaya Ditan Sdn Bhd*) *v* *M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620; [2010] 1 CLJ 269 at p 296 (FC). First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract (see *Investors Compensation Scheme Ltd v West Bromwich Building Society*; *Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others*; *Alford v West Bromwich Building Society and others*; *Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98). As Lord Clyde said in *Bank of Credit and Commerce International SA v Ali and others* [2001] 2 WLR 735:

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The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not

A resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. *The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.* (Emphasis added.)

C [26] In *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 2 All ER 1127; [2009] UKPC 10, when delivering the advice of the Board, Lord Hoffmann said:

D *The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.* However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at pp 912–913. *It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.* (Emphasis added.)

G [27] In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, the Federal Court elucidated the settled principles on the court's function to interpret and apply the contract which the parties have entered into. At p 486 of the judgment, Zainun Ali FCJ speaking for the Federal Court said:

H [55] As a relevant addendum, the relationship between interpretation and implication are considered in this discussion of the principles of construction. According to Lord Hoffman in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10; [2009] 1 WLR 1988 (PC) this characterisation can be traced back to the speech of Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 602 (HL), where His Lordship had warned:

I The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. *The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if*

*courts find that the parties must have intended that term to form part of their contract.* (Emphasis added.)

A

[28] In *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819, the Court of Appeal expressed the court's function in interpreting a contract in the following words at para [34]:

B

[34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve into the intricacies of the human mind to disclose one's undisclosed intention, but only to take the meaning of the words used by him, that is to say, his expressed intentions: see *Kamla Devi v Takhmil* AIR 1964 Vol 51 a Supreme Court of India decision at p 386.

C

[29] In his written judgment, the learned judge accepted the fact that there is no provision in the contract which allows for the imposition of interest or any other claims for late payment. However, the learned judge went on to opine that in order 'to give effect to the bargain of the parties and to business efficacy according to their intention in the contract' cl 50.4 did not specifically take away the plaintiff's right to claim for any loss, expense, interest or financing charges. The learned judge also appeared to have considered the evidence of PW1 who said that he signed the contract and agreed to the waiver of late payment interest under cl 50.4 subject to the implied term that after 31 March 2006 the plaintiff would be entitled to claim for interest for late payment and any loss and expenses caused by the delay in payment. In so doing the learned judge had taken into account the plaintiff's interpretation of cl 50.4. As such, the learned judge opined that cl 50.4 entitled the plaintiff to claim for loss, expense, interest or financing charges incurred against the defendant for delay or late payment on any interim certificate issued after 31 March 2006.

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[30] In our view, cl 50.4 is clear and free from ambiguity. We do not think this is a situation where the court is called upon to make a choice between two meanings. The learned judge ought to have disregarded the evidence of PW1 which was declaratory of subject intent. On the totality of the evidence on record, we do not see any justification for the importation of the implied term in order to give effect to the bargain of the parties or add to business efficacy.

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[31] We also agree with the submission of learned SFC that the computation of the 30 day time period for the payment of interim certificates is calculated from the date the interim certificate is issued by the PD. As such, the evidence shows that the interim certificates in question were paid within the 30 day timeline. Accordingly, the question of interest chargeable on late payment is a non-issue.

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- A [32] We now turn to the LAD issue. We have perused the appeal record and find ourselves in complete agreement with the submission of learned SFC. Altogether, four EOTs were granted to the plaintiff from 21 October 2008–16 February 2009 (a total of 117 days). LAD was only imposed for the period following the expiry of EOT4. We do not think that the delay in the
- B issuance of the occupation certificate by the Beaufort District Council is a material factor to be considered because: (i) the completion date is defined under the contract as the date of certification of practical completion by the PD pursuant to cl 41.2 of the contract; and (ii) as the contract is a design and build contract, it was the plaintiff's obligation to obtain the occupation certificate.
- C We are constrained to hold that the learned judge erred in finding that the date of completion should be based on the date of the occupation certificate. Accordingly, the LAD due to the defendant should be calculated on the basis of 27 days as submitted by learned SFC in preceding para [18].
- D [33] The plaintiff's cross-appeal relates to: (i) the quantum of the late payment interest; and (ii) the award of LAD. In the light of our decision on LAD above, we would dismiss item (ii). We would also dismiss item (i) in the light of our decision that the plaintiff is not entitled to claim for late payment interest under the contract.
- E
- F [34] For the foregoing reasons, the defendant's appeal is allowed. The decision of the learned judge allowing the plaintiff's claim for late payment interest is set aside. The decision of the learned judge allowing LAD is varied by substituting the amount of RM609,089.52 with RM685,225.17. The plaintiff's cross-appeal is dismissed. We awarded costs of RM10,000 to the defendant.

*Order accordingly.*

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Reported by Ashok Kumar

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